Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1746

NYDIA MARIA DIAZ-BUXO

Petitioner,

v.

HON. JOSE TRIAS MONGE, CHIEF JUSTICE OF THE SUPREME COURT OF PUERTO RICO, ET ALS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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SUBJECT INDEX

Page

INTRODUCTION 1

I. OPINION BELOW 2

II. JURISDICTION 2

III. QUESTIONS PRESENTED 2

Due to our disagreement with the questions presented for review as stated in the Petition for a Writ of Certiorari, we respectfully submit the following question for review as the controlling one: 2

Whether the United States District Court for the District of Puerto Rico properly dismissed the instant case on the grounds of Res Judicata 2

IV. STATEMENT OF THE CASE 2

V. ARGUMENT 5

VI. CONCLUSION 12

STATUTORY PROVISIONS:

28 U.S.C.A. Sec. 1254 (1) 2

Civil Rights Act 2

Fifth and Fourteenth Amendment to the Constitution of the United States. 3, 6

28 U.S.C.A. Sections 1331, 1343 (3) (4), 2281, 2284. ... 3

42 U.S.C.A. Section 1981, 1983 ..... 3, 7

5 U.S.C.A. Section 703 3

Page

Federal Rules of Civil Procedure R. 8(c) 9

Rule 12 (b) of the Federal Rules of Civil Procedure 9

Rule 12 (g) 9

Rule 6 (e) of the Federal Rules of Civil Procedure 10

Rule 6 of the Rules of the United States District Court for the District of Puerto Rico 9

TABLE OF AUTHORITIES

Page

CASES:

Algarin v. *District Court*, 59 P.R.R. 848 (1942) 7

Bartolomei v. *Superior Court*, 77 P.R.R. 436, 437 (1954) 7

Berrios Rivera v. *British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978) 8

Bonet v. *Texas Co.*, 308 U.S. 463, 470-71 (1940) 8

Bonet v. *Vivaux Sugar Co.*, 306 U.S. 505, 510 (1939) . 8

Borinquen Furniture Inc. v. *District Court*, 78 P.R.R. 858, 861 (1956) 7

Francisco Diaz Marchand, et al v. *The Supreme Court of Puerto Rico*, Civil No. 74-50 3

Fernandez v. *Trias Monge*, 586 F.2d 848, 857 (1st Cir. 1978) 7

Fornaris v. *Ridge Tool Co.*, 400 U.S. 41, 43 (1970) 8

Graffals Gonzalez v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) 8

Grossgold v. *Supreme Court of Illinois*, 557 F.2d 122, 124-25 (7th Cir. 1977) 9

Page

In Re Request of the Board of Bar Examiners, 97 P.R.R. 843 (1969) 11

Jimenez v. *Jones*, 195 F.2d 159, 162-63 (1st Cir. 1952), *cert. denied* 344 U.S. 840 8

Lambert v. *Conrad*, 536 F.2d 1183 (7th Cir. 1976) 9

Pagan Torres v. *Negron Ramos*, 578 F.2d 11, 14-15 (1st Cir. 1978) *cert. denied* 58 L Ed. 2d. 682 (1978). 8

Regents of the University of California v. *Bakke*, 46 Law Week 4896 (1978) 11

Suarez v. *Administrador del Deporte Hipico de Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972) 7

Thomas v. *Consolidated Coal Co.*, 380 F.2d 69 (4th Cir. 1967), *cert. denied* 389 U.S. 1004, *reh. denied*, 399 U.S. 1059 9

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TO THE HONORABLE COURT:

Now come the Respondents through their undersigned attorneys and respectfully pray that the Writ of Certiorari requested by Petitioner to review the opinion and judgment of the United States Court of Appeals for the First Circuit entered on these proceedings on February 23, 1979, be denied.

I

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, not yet officially published, is printed in the Appendix to Petition for a Writ of Certiorari.

II

JURISDICTION

The jurisdiction of this Honorable Court is correctly invoked under 28 U.S.C.A. Sec. 1254 (1).

III

QUESTIONS PRESENTED

Due to our disagreement with the questions presented for review as stated in the Petition for a Writ of Certiorari, we respectfully submit the following question for review as the controlling one:

Whether the United States District Court for the District of Puerto Rico properly dismissed the instant case on the grounds of Res Judicata.

IV

STATEMENT OF THE CASE

After the results of the bar examinations prevented her admission to the bar of the Supreme Court of the Commonwealth of Puerto Rico, herein Petitioner filed a complaint in the United States District Court for the District of Puerto Rico, under the Civil Rights Act, against the Justices of the Supreme Court of

Puerto Rico and the members of the Bar Examining Board. The action requested the convening of a Three-Judge Court to declare the inconstitutionality of the procedure of the Supreme Court of Puerto Rico for the licensing of lawyers, as violative of the Fifth and Fourteenth Amendment to the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C.A. Sections 1331, 1343 (3) (4), 2281, 2284, 42 U.S.C.A. Section 1981, 1983 and 5 U.S.C.A. Section 703.

The complaint alleged that the Due Process Clause is violated as there is a lack of procedural safeguards and remedies in the handling and denial of applications for licenses to practice law in Puerto Rico. Specifically, her contention was that she had passed the bar examinations, but was notified that she failed and has since then denied her alleged right to see, examine and have access and knowledge of all the evidence pertaining to the grading of her examination papers.

Moved by defendant's Motion to Dismiss[1] for lack of jurisdiction, the U.S. District Court for the District of Puerto Rico entered a judgment dismissing the case for lack of a substantial federal question. (Appendix of Petition, p. 25-27).

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[1] While defendants' Motion to Dismiss was pending resolution, and prior to the District Court's disposition of the case, defendants submitted an Informative Motion advising the District Court of the recent order issued by a Three-Judge Court in the case of *Francisco Diaz Marchand, et al* v. *The Supreme Court of Puerto Rico*, Civil No. 74-50, where dismissal was entered for lack of a substantial constitutional claim. Said case, although not identical, presented related issues and allegations with the case at bar. For that reason, defendants reiterated their dismissal request for the grounds set forth in their previous Motion to Dismiss.

On appeal to the U.S. Court of Appeals for the First Circuit the case was reversed and remanded. It was decided that a single District Judge was without jurisdiction to dismiss plaintiff's claim as meritless. Only a court of three judge could do that. However, bearing in mind that cases should, if possible, be disposed of on non-constitutional grounds, being able to act upon such matters a single judge, the Court of Appeals instructed the District Court to consider as possible grounds for disposition of the case, first, the question of mootness and, second, the possibility that the action was barred by the doctrine of res judicata. If neither of those issues were determinative, or if the answer to them was uncertain, it was ordered that the District Court should request the appointment of a three-judge court. (Appendix of Petition, p. 21-23)

The U.S. District Court, in accordance with the Court of Appeals' mandate, ordered the defendants to file their answer to plaintiff's complaint within ten days from the entry of the same and to submit therewith documentation indicating whether or not plaintiff (herein petitioner) had retaken the bar exam and passed. Eleven days after entry of the District Court's order, defendants, without filing an answer, moved to dismiss on the basis of res judicata and submitted a copy of plaintiff's record before the Supreme Court of Puerto Rico, from which it clearly appears that plaintiff voluntarily withdrew her application to retake the bar exam to avoid mootness of the case. Plaintiff subsequently sought unsuccessfully to default the defendants for failure to comply with the Court's order. Plaintiff's complaint was dismissed on res judicata grounds. (Appendix of Petition, p. 11-17)

On second appeal, the Court of Appeals for the First Circuit upheld the ruling of the District Court precluding plaintiff to relitigate her constitutional issues in the federal forum, having the Supreme Court of Puerto Rico adjudicated the same on the merits. To arrive at said decision, the Court of Appeals considered the nature of the request made by the Petitioner before the Supreme Court of Puerto Rico, and the expertise of the District Court upon construing local procedure such as interpreting certain language used by the Supreme Court of Puerto Rico when denying petitioner's claims. (Appendix of Petition, p. 1-9)

V.

ARGUMENT

Petitioner disputes, as one of the questions presented for review in the Petition for a Writ of Certiorari, the sufficiency of a denial of an Ex Parte Petition which contains the language "no ha lugar" as an appropriate ground for res judicata, and also, as an adecuate ground for petitioning a writ of certiorari from this Honorable Court. Certainly, if there is a fundamental issue involved in the instant case, that should be the one.

Once the petitioner was notified of her unfavourable results on the bar examination, she resorted to the Supreme Court of Puerto Rico seeking remedies. Thus, petitioner filed a writ attacking the bar exam as "lacking objectivity" and asked for a review of her case, request which was denied. Then, petitioner filed two more writs, requesting, among others, a copy of her bar exam, of the answer key to the same, inspection of the exams of all other applicants, etc. In one

of the writs, which was entitled "Motion for Reconsideration", petitioner explicity stated that her request addressed itself to her constitutional rights to equal protection of the laws and to the due process of law granted by the Fifth and Fourteenth Amendment to the Constitution of the United States of America. The substantive federal claim was specifically presented as follows:

> "That the Supreme Court's determination related to petitioner, of not admitting her to the exercise of the law lacks basis and violates her right to due process and to the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America; because the rules for grading for approval are arbitrary and because the procedure of designing and correcting the exam is arbitrary itself." (Appendix of Petition, p. 5-6)

The Supreme Court of Puerto Rico, upon considering petitioner's request, issued a Resolution in the plaintiff's (herein petitioner) exparte proceeding which stated in part as follows:

> "To the writs dated December 23, 1974, one entitled 'Motion for Reconsideraton' and the other entitled 'Motion', "*no ha lugar.*" The mechanics in the correction of bar exams forbids the examiner to make any traces of any kind in the corrected notebook, so that the following examiner in cases of recorrection will not have any indication of the evaluation affected by the first examiner. For such a reason, no practical ends would be achieved by permitting the aspirant to examine said notebooks after the same have been corrected." (Appendix of Petition, p. 13)

As it was correctly held in the instant case, there is no doubt that petitioner's constitutional claim

raised in her sec. 1983 suit was virtually identical to that advanced before the Supreme Court of Puerto Rico; claim which the Supreme Court of Puerto Rico, acting as a *court* of *law*,[2] entertained on the merits and disposed of properly. Hence, it must be concluded that the petitioner was estopped from relitigating the same constitutional issue before the District Court.

The language "no ha lugar", used by the Supreme Court of Puerto Rico when disposing petitioner's claims, in the context of a petition for certiorari to the Puerto Rico Supreme Court is equivalent to the statement "certiorari denied", or that the Court will not exercise its discretion to grant the extraordinary relief requested. *Suarez* v. *Administrador del Deporte Hipico de Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972); *Borinquen Furniture, Inc.* v. *District Court*, 78 P.R.R. 858, 861 (1956); *Bartolomei* v. *Superior Court*, 77 P.R.R. 436, 437 (1954); *Algarin* v. District Court, 59 P.R.R. 848 (1942). See also *Fernandez* v. *Trias Monge*, 586 F.2d 848, 857 (1st. Cir. 1978). However, the U.S. District Court for the District of Puerto Rico, based on its familiarity with local procedure, correctly ruled that while "no ha lugar" is an administrative disposition of a case in the context of a writ of certiorari, in the instant proceeding it was equivalent to the statement "reconsideration denied" and was a disposition on the merits of petitioner's constitutional

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[2] It is well settled by Puerto Rican case law that the admission of persons to the practice of law is a judicial function. *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236, 242, 245 (1942). The Supreme Court of Puerto Rico entertains petitions for admission in the normal course of its judicial proceedings and renders decisions thereon. See, for example, *Ex Parte Jimenez*, 55 P.R.R. 51 (1939).

claims. It was also noted that such an interpretation was underscored by the fact that the Supreme Court of Puerto Rico had accompanied the "no ha lugar" by an explicit consideration of some of petitioner's arguments. (Appendix of Petition, p. 16)

The District Court's interpretation of the phrase "no ha lugar" conforms with the practical and historic understanding of the operation of the Supreme Court of Puerto Rico, and in no way results inconsistent with the opinion of the Court of Appeals for the First Circuit in the case of *Jimenez* v. *Jones*, 195 F.2d 159, 162-63 (1st Cir. 1952), cert. denied, 344 U.S. 840. In that case it was recognized that the Puerto Rico Supreme Court's denial of a petition for habeas corpus "no ha lugar" may be a resolution of the merits of petitioner's claims but decided, due to the particular circumstances of the case where no further explanation had accompanied the denial, that a determination on the merits had not been intended. Therefore, not being the District Court's interpretation of the phrase "no ha lugar" in the context of a Motion for Reconsideration "inescapably wrong" or "patently erroneous", substantial deference must be accorded to the District Court's determination on this matter of local procedure. *Berrios Rivera* v. *British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 43 (1970); *Bonet* v. *Texas Co.*, 308 U.S. 463, 470-71 (1940); *Bonet* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 510 (1939); *Pagan Torres* v. *Negron Ramos*, 578 F.2d 11, 14-15 (1st Cir. 1978), cert. denied 58 L Ed. 2d 682 (1978).

Having the Supreme Court of Puerto Rico passed on the merits of petitioner's claims, it necessarily decided the constitutional issues raised. *Grossgold* v. *Supreme Court of Illinois*, 557, F.2d 122, 124-25 (7th Cir. 1977). Thus, petitioner's only federal review available was at this Honorable Court by petition for certiorari. 28 U.S.C.A. Sec. 1258 (3).

On the other hand, regarding the procedural aspects of the form in which res judicata was raised in the instant case, we must say that, certainly, the petitioner attributes to it more significance that it really has.

First of all, although ordinarily res judicata is pleaded as an affirmative defense, Fed. R. Civ. P. 8(c), as held by the Circuit Courts of Appeals, where the substantive rights of parties are not endangered, it is within the discretion of the District Court to permit it to be raised by motion. *Lambert* v. *Conrad*, 536 F.2d 1183 (7th Cir. 1976); *Thomas* v. *Consolidated Coal Co.*, 380 F.2d 69 (4th Cir. 1967), cert. denied, 389 U.S. 1004, reh. denied, 399 U.S. 1059. In the case at bar, petitioner had a full opportunity to respond to defendants' motion as she in fact did in her lengthy motion in opposition to defendants' motion to dismiss. Having filed a previous motion to dismiss for lack of jurisdiction under Rule 12(b) of the Federal Rules of Civil Procedure did not barred defendants from raising res judicata in a pre-answer motion to dismiss, since the prohibition of Rule 12(g) of the Federal Rules of Civil Procedure against successive pre-answer motions expressly covers only those motions brought under Rule 12, though, as correctly held by the Circuit Court of Appeals, its policy may pertain in other instances.

Whether it was timely filed or not, the District Court had ample discretion to consider said motion

even though it was filed one day past due and apart from the applicability of the enlargement period provided by Rule 6(e) of the Federal Rules of Civil Procedure.

Even so, said motion to dismiss was pr[illegible]erly supported with some exhibits consisting of copies of petitioner's motions (written by herself) to the Supreme Court of Puerto Rico and the Court's responses thereto. One of the documents submitted was signed by the Clerk of the Supreme Court of Puerto Rico and certified the remainder as being copies of the originals. The best proof of their authenticity resides on the fact itself of the District Court's acceptance of them, even though petitioner's reiterated objections.

The fact that said documents where in the Spanish language and untranslated did not prevent the District Court from considering them, since under Rule 6 of the Rules of the United States District Court for the District of Puerto Rico, the district court has discretion to order the acceptance of documents in a language other than English. (Appendix of Petition, p. 4-5) Moreover, the translation to the English language of some portions of the documents made by the District Court Judge, even though it is not the usual proceeding, was clearly inconsequent. All the parties involved where fully conversant with Spanish; petitioner never alleged that the documents were not readily understood by her, nor questioned the accuracy of the judges' translation. So, taking into account the aforementioned reasons, it cannot be validly argued that the decision below is "totally devoid of evidentiary support" as to render it per se unconstitutional under the due process clause.

Therefore, it must be concluded, as correctly held by the Circuit Court of Appeals, that in the instant case res judicata was properly raised in an adequately supported pre-answer motion to dismiss.

Finally, petitioner contends that the system of admissions and licensing procedure of the law profession in Puerto Rico are a "secret system of quotas" which conflicts with this Honorable Court's decisions in cases like *Regents of the University of California* v. *Bakke,* 46 Law Week 4896 (1978).

Even though this matter was not subject to revision before the Circuit Court of Appeals, we must affirm that there are not such things as "quotas" or a "secret system" to discriminate in the licensing procedure of the law profession in Puerto Rico.

In support of her highly speculative contention petitioner relies on the dissenting opinion of the late Justice Santana Becerra in *In Re Request of the Board of Bar Examiners,* 97 P.R.R. 843 (1969).

. Petitioner misconceives Justice Santana's dissent. What appears patently from said dissenting opinion is the Justice's preocupation that the study ordered to be conducted by the Highest Council of Education regarding the teaching of law in the schools of law of Puerto Rico would contain all the concurrent factors which might have given rise to the existence of a high percentage of failures of law graduates in their bar examinations. Thus, at page 853 it expressly rejected groundless speculations such as petitioner's ones.

> "(7) It is a true fact which I must set forth, in part because of the wrong and groundless speculations which have been made in outside sources as a result of the lack of knowledge of the pro-

> cedure followed, that both by the Board and by the Court, the procedure of readjustment has been the result of a rational weighing of factors involved equally applicable to all candidates, and equally benefiting all of them in their respective grades . . .
>
> * * *
>
> (m) In the discharge of my responsibility in all this problem I must reject, because they are not supported by the facts, the wrong speculations expressed in other spheres in the sense that all this situation might be the result of the interest of a professonal class to curtail the entrance to the bar . . . I repeat that I do not find any factual basis."

It is manifest that there is no conflict of decisions nor an important question of federal law requiring decision by this Honorable Court.

VI
CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico, July 25, 1979

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MIGUEL A. SANTANA BAGUR
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